

## JURISDICTIONAL STATEMENT

This is an appeal from the Labor and Industrial Relations Commission's Final Award Allowing Compensation (affirming award and decision of Administrative Law Judge, Nelson G. Allen) finding Appellant-Respondent entitled to Permanent Partial Disability of 81.875% body as a whole or 327.5 weeks.

Appellant-Respondent had filed for Permanent Total Disability.

Appellant-Respondent appeals to this Court alleging the Administrative Law Judge and the Industrial Relations Commission failed to follow Missouri case law for Permanent Total Disability in view of the facts regarding Appellant-Respondent's disabilities.

## APPELLANT/RESPONDENT'S STATEMENT OF FACTS

Claimant is a 41-year-old single woman. (T,p.3,L.21-22).

On April 8, 1995, she was working as a cook at 36<sup>th</sup> Street Food & Drink of St. Joseph Missouri. (T,p.3,L.23-24;p.4,L.1). She walked around an ice machine to drain food products in a utility sink. She slipped on water from the ice machine and fell backwards with her left knee bent under her. (T,p.4,L.11-28). The ice machine had been leaking for over two years. (Legal File p.1-2).

She was taken to Heartland Hospital East by ambulance. Emergency treatment and x-rays were provided and she was referred to the MedClinic of St. Joseph, Missouri. (T,p.4,L.19-22;p.5,L.4-11).

Doctors at the MedClinic examined her and referred her to daily therapy at St. Joseph. She was seen several times by the MedClinic doctors and released to return to work on May 1, 1995, at the 36<sup>th</sup> Street Food & Drink. (T,p.5,L.12-24;p.6,L.1-2).

Claimant did not return to work at 36<sup>th</sup> Street Food & Drink. She stated she had swelling in her left knee and could not use it – “I couldn’t walk on it right.” (T,p.6,L.3-7).

She stated that as a cook, the physical requirements included stooping, squatting and knelling. She had to carry heavy trays of meat, help unload foods and linens and stand on her feet for long periods of time. (T,p.6,L.8-24;p.7,L.1-4). She stated she had been a cook for many years and had worked at several popular restaurants in St. Joseph, such as 36<sup>th</sup> Street, Denny’s, Snow White, Bonnie & Clydes and Boat House, the latter two as a kitchen manager. (T,p.7,L.7-12). Cooking had been her life’s work experience, which she enjoyed. (T,p.7,L.5-6).

When Claimant was working at 36<sup>th</sup> Food & Drink, she had the following handicaps:

- a. Right ankle shattered in an automobile accident along with compound fractures of both right leg bones, requiring her to wear a leg brace for her right ankle. (T,p.8,L4-12;p.10,L.6-9).
- b. Diabetic; on insulin since 1988; prescribed by Dr. Berkowitz. (T,p.8,L.22-23;p.9,L.1-11).
- c. Morbid obesity, 260-280 pounds. (T,p.7,L.18-22;p.188, L. Item 2 of Discharge Diagnosis).

Claimant contacted counsel advising of her accident and that she was having trouble with her left knee. She had seen Dr. William Gondring, M.D., of St. Joseph Orthopedic, Inc., about her right ankle previously and was recommended to get an appointment to see him. (T,p.9,L.21-23;p.10,L.10-16).

Claimant saw Dr. Gondring on May 17, 1995. She saw him several times and was given injections in her left knee. (T,p.10,L.10-24). She did not get any better and Dr. Gondring recommended an MRI. She had popping and swelling in her left knee and it would lock up and she fell several times. (T,p.11,L.1-9). The MRI was done and Dr. Gondring thought she needed arthroscopic surgery on her left knee. (T,p.11,L.10-22).

Employer's attorney was contacted, who requested Dr. Gondring's records, which were sent to him. (T,p.11,L.23-24;T,p.12,L.1-9).

Employer made an appointment for Claimant to see Dr. William Bohn at Kansas City on August 25, 1995. Dr. Bohn, upon examination, concurred that Claimant needed arthroscopic surgery and scheduled it for October 6, 1995 at Research Hospital (T,p.12,L.12-24; p.13,L.1-7). After the operation, Claimant went to see Dr. Bohn every couple of weeks and went to therapy at St. Joseph for about 6 weeks. (T,p.13,L.12-24).

Dr. Bohn released Claimant on November 28, 1995. She still had inflammation of the knee and popping. (T,p.14,L.1-6). Dr. Bohn told her to come back to see him in a couple of months. (T,p.14,L.18-19). On January 16, 1996, Claimant went to see Dr. Bohn and complained that her left knee was popping and the knee was locking up and that she had fallen. (T,p.14,L.20-24;p.15,L.1-9).

Dr. Bohn provided her with a brace for her left knee when he saw her in January. She could not wear her left knee brace and right ankle and right leg braces, which came up to her right knee at the same time, because the two braces would lock and cause her to fall. (T,p.15,L.12-24). Claimant had another fall when her left knee locked up causing her to fall on March 6 at Food-4-Less. She was walking to get a grocery cart when her left knee locked up. She tried to kick it to pop it open and it went out from underneath her. She skinned her left knee on May 6, 1996. She called Dr. Bohn and he saw her on May 7, 1996. (T,p.16,L.3-24;p.17,L.1-6).

Dr. Bohn said she needed an MRI. (T,p.17,L.1-6).

When nothing developed about the MRI, the matter was called up for hearing before Judge Allen. At the hearing, Employer agreed to another MRI. (T,p.17,L.7-14).

Claimant went down to Research Hospital at Kansas City and had the MRI on July 18, 1996. She was told the MRI showed an extension of the tear in the medial meniscus. (T,p.17,L.16-24;p.18,L.1). Dr. Bohn scheduled her for a second operation on September 16, 1996. She went down to Research Hospital and was in Post-Op, ready for the operation, when the nurse told her she would have to pay for the operation since Workers' Compensation had not approved. She came back to St. Joseph. (T,p.18,L.6-18).

Nothing happened for about nine months till June 23, 1997, when Employer's attorney took Claimant's deposition. (T,p.18,L.19-23). Claimant testified about the continuing problems she was having with her left knee; that it was still popping, creaking, locking up and gave out. She said her knee had not gotten any better and she had fallen several times. (T,p.19,L.16-24).

A few days later, Employer's attorney notified Claimant's attorney that a second operation was authorized. Dr. Bohn scheduled the operation for November 14, 1997. (T,p.20,L.22-24;p.21,L.1-3).

While Claimant was working at 36<sup>th</sup> Street Food & Drink, she also worked at Specialized Support Services, which was a sedentary job where she did not have to be on her feet. She counseled adults and teenagers on their various living needs, such as operation of utilities, washing machines, dishwasher, cleaning equipment. She also counseled them on their grocery purchases and other needs and sat with some of them. (T,p.21,L.8-24;p.22,L.1-4). For these services, she was paid \$6.50 per hour. She worked at Specialized through 1995, except for medical leave for her left knee, and 1996 until November 15, 1996. (T,p.21,L.14-17). On November 16, 1996, she commenced work at Unity, which was the same type of sedentary employment as at Specialized and at the same rate of pay of \$6.50 pr hour. She continued working at Unity until November 13, 1997, the day before her second arthroscopic operation. (T,p.21,L.11-17),L.9-10;p.22,L.5-21).

Dr. Bohn performed the second arthroscopic operation on Claimant's left knee at Research Hospital in Kansas City on November 14, 1997. (T,p.25,L.1-8). Claimant was referred to daily therapy at St. Joseph. (T,p.25,L.9-10). Claimant went to Kansas City

for examinations about every two weeks. She was released on April 23, 1998. (T,p.25,L.13-15). The treatment was more prolonged, being some 23 weeks as compared to 6 weeks for the first arthroscopic surgery. (T,p.25,L.11-17).

Claimant had never had problems with her left knee prior to her accident on April 8, 1995. She had no popping or anything like that. She could squat, kneel down and take care of the workload for a regular cook. (T,p.26,L.1-9).

After the second arthroscopic operation by Dr. Bohn, Claimant was unable to return to any employment. (T,p.26,L.10-11). She was still having problems with her left knee popping, creaking, locking up and threatening falling, and pain in her left knee. (T.p.25,L.20-24;p.26,L.12-14).

Claimant's diabetic condition had steadily progressed. As it progressed, amended claims for Permanent Total Disability were filed on November 3, 1998, March 24, 1999, January 31, 2000 and February 9, 2000, detailing her deteriorating condition. (Legal File, p.5-8; 11-14; 16-20;21-24).

All of the Amended Claims set forth that on September 18, 1998, Claimant's left knee was popping and locked up, causing her to fall on both knees. She was advised to get emergency treatment at St. Joseph. She then saw Dr. Bohn and advised she should have another MRI, which was done.

Claimant has a family background of diabetes. Her mother died of diabetes after amputations of her legs and her grandmother died of diabetes. (T,p.26,L.17-22). Claimant's diabetes began about 18 years ago. Dr. Berkowitz treated her from 1988 to 1993 during which time and since she has been on insulin. (T,p.27,L.10-12). Dr. Leanna Hoffman commenced treating her in January, 1999 and diagnosed that she had diabetes

with neuropathy. (Hoffman deposition, Exhibit 1 of Claimant's Exhibit B). (T,p.188, Item 3 of Discharge Diagnosis).

The neuropathy affects the nerves in her legs, arms and hands. (T,p.159,L.6-20). It brings on carpal tunnel and she has recently had that operation on each hand. Also, recently she had two other operations on one hand and one on the other for trigger finger which relates to nerves in her hands. (T,p.173,L.15-24;T,p.174,L.5-11). Dr. Hoffman's Exhibit 4 of claimant's Exhibit B (T,p.193) points out that Claimant's diabetes with neuropathy causes long-term pain and is difficult to control. (T,p.193).

The control of diabetes for Claimant is difficult. Exercise is important, but because of her 20% disability of her left knee with popping, creaking and locking up, and 50% disability of her right ankle, exercise is not a real option. She can just get around to take care of herself and is unable to participate in an exercise program. (T,p.28,L.6-10).

Dr. Hoffman diagnosed Claimant as Morbid Obesity. (Hoffman deposition, Exhibit 1 of Claimant's Exhibit B). Claimant stated her weight was between 260 and 280 pounds now and when working at 36<sup>th</sup> Street Food & Drink. (T,p.7,L.18-22).

Diet is another item of control of diabetes. Claimant stated she has tried all kinds of diets, and special diabetic diets are very expensive and she cannot afford them. (T,p.28,L.11-18). Apparently some of Dr. Hoffman's prescription drugs are to help control diabetes. Dr. Hoffman has prescribed 24 drugs a day, plus insulin for Claimant, of which 16 pills a day are for pain. Dr. Hoffman says Claimant has big-time pain. (Hoffman deposition, Claimant's Exhibit B, pages 12, 14-15). (T,p.163, 165-166). The problem with the drugs is that Claimant has to take food to counter the drugs' effect on her stomach. The problem has worsened, because she now has to be on 60 pills per day,

which are detailed in her deposition taken on February 26, 2001. (T,p.29,L.21-23;p.30,L.7-24;p.31,L.1-22), and by the Exhibit attached to her deposition. (Claimant's Exhibit G). T,p.329).

Being unable to work anywhere anymore, Claimant applied for and was examined for Social Security Disability and was approved. She began receiving \$604.00 per month in 1998 and now receives \$640.00 per month. (T,p.39,L.12-21).

Claimant attempted to introduce Claimant's Exhibit E, being a Social Security record bearing her name, social Security number, date of birth and income she had received in 1995-1997. (T,p.328). The admission of this exhibit was refused. Claimant stated she was fully employed by specialized Support Services in 1995 except when on medical leave because of her left knee and continued with Specialized in 1996 until November 15, when she was employed by Unity on November 16, 1996, and continued into 1997 until November 13, 1997, the day before her second arthroscopic knee operation. At both of these full-time sedentary jobs, she was paid \$6.50 per hour.

Dr. William Gondring, in his deposition of July 27, 2000, was asked, in view of Claimant's knee injury, ankle injury, diabetic condition with neuropathy affecting her hands and her obesity, if he had an opinion as to whether or not she was employable. It was his opinion she was not employable. (T,p.207,L.9-17). He was further asked if even in a sedentary job, because of her neuropathy in her hands, if she would be able to perform any kind of work. It was his opinion, "She would be unable to do simple pushing, pulling, grasping, grabbing, alternation motion, fine motion with her hands, because with the neuropathy, she would lose the position sense of where her fingers are because of lack of feeling. She would also have lack of strength, so she would have



weakness, lack of control and numbness, plus pain.” (Claimant’s Exhibit C, pages 13 and 14). (T,p.207,L.2-25;p.208,L.1-3).

Dr. William Gondring, in his deposition of February 2, 2001, (Second Injury Fund, Exhibit 2), was asked about the prescribed drugs Claimant was taking and, in particular, those related to morphine and pain. He was advised she was taking 60 pills per day and asked how they would relate to employability. He stated, “They would absolutely negatively affect your employability. As a matter of fact, you would be at risk and hazard working in any place for repeat injury, because of balance, strength, and mental acuity.” (Employer/Insurer Exhibit 2, pages 19 and 20). (T,p.349,L.19-25).

Dr. Gondring also testified Claimant had two unsuccessful surgeries on her left knee. (T,p.380,L.21-22).

## POINTS RELIED UPON

A. The Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation at St. Joseph, Missouri, erred in finding Appellant-Respondent entitled to Permanent Partial Disability of 81.875% body as a whole or 327.5 weeks, which was affirmed upon appeal to the Labor and Industrial Relations Commission at Jefferson City, Missouri. Appellant-Respondent had filed for Permanent Total Disability.

The legal reasons for Appellant-Respondent's claim of reversible error is because of her inability to return to any reasonable or normal employment. The Missouri cases cited herein set forth the law for Permanent Total Disability.

A review of the undisputed facts and Missouri support Appellant-Respondent's claim of reversible error.

B. The Missouri Law For Permanent Total Disability.

In Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo.App.1990), the court stated at p. 483:

“The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. Laturno v. Carnahan, 640 S.W.2d 472 (Mo.App. 1982).”

and

\*\* “Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert. The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical condition reasonably expecting him to perform the work for which he is hired. Kolwalski v. M-G Metals & Sales, Inc., 631 S.W.2d 919 (Mo.App. 1982).”

In Patchin v. National Supermarkets, Inc., 738 S.W.2d 166 (Mo.Ct.App. 1987), the court stated at l.c. 167:

\*\*\* “The test for permanent total disability in Missouri is the worker’s ability to compete in the open market in that it measures the worker’s prospects for returning to employment.”

The cases of Garibay v. Treasurer of State of Missouri, are very interesting. The last case is cited at 964 S.W.2d 474. Claimant, for the third time, appealed an award of the Labor & Industrial Relations Commission denying benefits from the Second Injury Fund. On January 16, 1989, Claimant sustained an injury to his left shoulder. His claim against his employer was settled. An Administrative Law Judge heard his claim against the Fund which was based upon allegations of prior disabilities of “morbid obesity, sleep apnea and previous injuries to the left lower extremity and right upper extremity”. The ALJ found Claimant was permanently and totally disabled and made an award against the Fund.

The Garaby case held t l.c. 480: “We find the Commission erred entering an award denying compensation against the Fund. As a matter of law, the only evidence regarding obesity, sleep apnea and other pre-existing conditions supported the findings that Claimant is permanently and totally disabled.”

## ARGUMENT

The Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation at St. Joseph, Missouri, erred in finding Appellant-Respondent entitled to Permanent Partial Disability of 81.875% body as a whole or 327.5 weeks, which was affirmed upon appeal to the Labor and Industrial Relations Commission at Jefferson City, Missouri. Appellant-Respondent had filed for Permanent Total Disability.

The legal reasons for Appellant-Respondent's claim of reversible error is because of her inability to return to any reasonable or normal employment. The Missouri cases cited herein set forth the law for Permanent Total Disability.

A review of the undisputed facts and Missouri support Appellant-Respondent's claim of reversible error.

Appellant-Respondent, with all of her disabilities, would not have the ability to compete in the open job market for any employment. No employer would risk employing her.

Judge Allen and the Commission overlooked the established Missouri law for Permanent Total Disability.

The applicable standard of review is the careful consideration of the undisputed facts applied to the Missouri cases stating the test for Permanent Total Disability.

## CONCLUSION

Appellant-Respondent is entitled to an award of Permanent Total Disability.

Respectfully submitted,

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